STATE OF MICHIGAN

IN THE SUPREME COURT

MICHIGAN GUN OWNERS, INC.; and,
ULYSSES WONG,

Plaintiff-Appellants

v

SC: 155196
COA: 329632
Washtenaw CC: 15-000427-CZ

ANN ARBOR PUBLIC SCHOOLS; and,
JEANICE K. SWIFT,

Defendant-Appellees/

SUPPLEMENTAL BRIEF ON APPEAL OF AMICUS CURIAE MICHIGAN COALITION FOR RESPONSIBLE GUN OWNERS

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STATEMENT OF JURISDICTION

The Michigan Coalition for Responsible Gun Owners Foundation defers to the statements of jurisdiction as presented by the plaintiff/appellants of this case and the companion case, *Michigan Open Carry, Inc v Clio Area School District*, Docket No. 155204.

STATEMENT OF QUESTIONS ADDRESSED

I. Whether, in light of MCL 123.1102, it is necessary to consider the factors set forth in *People v Llewellyn*, 401 Mich 314 (1977), in order to determine whether the school district's policies are preempted?

The trial court answered:	Yes
The Court of Appeals answered:	Yes
Plaintiff-Appellants answer:	Yes
Defendant-Appellees answer:	No
Amicus curiae MCRGO Foundation answers:	Yes

II. Whether the Court of Appeals properly analyzed the *Llewellyn* factors?

Plaintiff-Appellants answer:	No
Defendant-Appellees answer:	Yes
Amicus curiae MCRGO Foundation answers:	No

III. Whether the Court of Appeals correctly held that the school district's policies are not preempted?

Plaintiff-Appellants answer:	No
Defendant-Appellees answer:	Yes
Amicus curiae MCRGO Foundation answers:	No

STATEMENT OF FACTS

The Michigan Coalition for Responsible Gun Owners Foundation defers to the statements of facts as presented by the plaintiff/appellants of this case and the companion case, *Michigan Open Carry, Inc v Clio Area School District*, Docket No. 155204.

ARGUMENT

I. IN LIGHT OF 123.1102, IT IS NECESSARY TO CONSIDER THE FACTORS SET FORTH IN *PEOPLE v LLEWELLYN*, 401 MICH 314 (1977), TO DETERMIUNE WHETHER THE SCHOOL DISTRICT'S POLICIES ARE PREEMPTED.

This Court established in *Llewellyn* a test to determine whether regulation by a lower-level unit of government is preempted by the state legislature. Preemption follows where 1) the regulation is in direct conflict with the state statutory scheme, or 2) if the state statutory scheme preempts by occupying the field of regulation, as determined by a four factor test. *People v Llewellyn*, 401 Mich 314, 322; 257 NW 2d 902 (1977).

Since a dispositive issue in this case is whether the Legislature has preempted the school district's regulation, *Llewellyn* applies. If there is direct conflict, the lower-level unit of government is preempted. If there no direct conflict, then the four factor test is considered. There are two possibilities: 1) the school district is preempted because its regulation directly conflicts with the state statutory scheme, or 2) it is necessary to consider the four factor test.

A. The school's district's policy directly conflicts with MCL 750.237a(5)(c).

Article 1, § 6 of the Michigan Constitution of 1963 provides, "Every person has a right to keep and bear arms for the defense of himself and the state." Const 1963 art 1, § 6. Every constitution of this state has included the provision. Const 1835 art 1, § 13; Const 1850 art 18, § 7; Const 1908 art 2, § 5. The carrying of firearms has always been a Michigan constitutional right. In 1927, the Legislature limited the carrying of concealed weapons to those persons with permits. 1927 PA 327. The Michigan Constitution provides an express and affirmative right to individuals to possess firearms.

Enacted in 1931, MCL 750.237a(4) generally proscribes the carrying of firearms in weapon free school zones. 1931 PA 328. Subsection (5) of the statute provides persons that the

section does not apply to, including "An individual licensed by this state or another state to carry a concealed weapon." MCL 750.237a(5)(c). MCL 750.237a was last amended in 2017, and subsection(5) remained undisturbed. 2017 PA 96.

Enacted in 2000, an amendment to 1927 PA 327, MCL 28.425o(1)(a) specifically proscribes the carrying of a *concealed* firearm on the premises of "A school or school property except that a parent or legal guardian of a student of the school is not precluded from carrying a concealed pistol while in a vehicle on school property, if he or she is dropping the student off at the school or picking up the student from the school." 2000 PA 381. MCL 28.425o was last amended in 2017, and subsection (1) remained undisturbed. 2017 PA 95.

The school district's policy directly conflicts with MCL 750.237a(5)(c). The objective of the school district's policy is to prevent citizens, whether a CPL holder or otherwise, from carrying a firearm on school property. The state statutory scheme already proscribes all of the conduct that the school district seeks to further regulate, other than open-carry (non-concealed) by a CPL holder. MCL 750.237(a)(4); MCL 28.425o(1)(a).

The Michigan Constitution establishes an express right to bear and possess firearms for the purpose of self-defense. Const 1963, art 1§ 6. The Legislature expressly exempted CPL holders when proscribing firearms in weapon free school zones. MCL 750.237a(5)(c). The Legislature itself narrowed its express provision for CPL holders through MCL 28.425o.

> A plain reading of section 5o(1) of the Concealed Pistol Licensing Act discloses, however, that its prohibition applies only to the carrying of pistols that are "concealed." A holstered pistol carried openly and in plain view is not "concealed" and therefore does not violate the prohibition contained in that section.

2002 Mich. Op. Att'y Gen. No. 7113 (June 28, 2002) (internal citation omitted). Yet, the school's policy seeks to further narrow carrying firearms by CPL holders in contradiction of the Legislature's express permission.

Further, the recent amendment of both statutes supports a legislative intent for maintaining the scheme permitting open-carrying by CPL holders. *Sparks v Sparks*, 440 Mich 141, 157; 485 NW2d 893 (1992) ("The Legislature's failure to amend the [statute] weighs against deducing such a legislative intent. . . ."). And, there is good reason to exempt CPL holders since they have submitted to background checks and have been trained in order to qualify for their licenses.

B. Since schools are provided less authority than municipalities, it is illogical to preempt municipalities, but not school districts.

It is illogical to preempt cities, townships, and other municipalities from regulating possession of firearms while continuing to permit school districts, organizations with less authoritative power, to regulate the possession of firearms.

Both municipalities and schools are created by the legislative branch of government; however, they are not granted equal power. Municipalities "are empowered to enact any ordinance or charter provision deemed necessary for the public interest, as long as the enactment is not contrary to or preempted by the state constitution or state laws." *In re Wilcox*, 233 F3d 899, 906, n 5 (6th Cir 2000). The grant of authority to municipalities is broad.

School districts, on the other hand, have a narrow scope of authority. The Revised School Code instructs the authority if a general power school district:

> (3) A general powers school district has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to a power expressly stated in this act; and, except as otherwise provided by law, may exercise a power incidental or appropriate to the performance of a function related to operation of a public school and the provision of public education services in the interests of public elementary and secondary education in the school district, including, but not limited to, all of the following:
>
> (a) Educating pupils. In addition to educating pupils in grades K-12, this function may include operation of preschool, lifelong

> education, adult education, community education, training, enrichment, and recreation programs for other persons. A school district may do either or both of the following:
>
> (i) Educate pupils by directly operating 1 or more public schools on its own.
>
> (ii) Cause public education services to be provided for pupils of the school district through an agreement, contract, or other cooperative agreement with another public entity, including, but not limited to, another school district or an intermediate school district.
>
> (b) Providing for the safety and welfare of pupils while at school or a school sponsored activity or while en route to or from school or a school sponsored activity.
>
> (c) Except as otherwise provided in this section, acquiring, constructing, maintaining, repairing, renovating, disposing of, or conveying school property, facilities, equipment, technology, or furnishings.
>
> (d) Hiring, contracting for, scheduling, supervising, or terminating employees, independent contractors, and others, including, but not limited to, another school district or an intermediate school district, to carry out school district powers. A school district may indemnify its employees.
>
> (e) Receiving, accounting for, investing, or expending public school money; borrowing money and pledging public school funds for repayment; and qualifying for state school aid and other public or private money from local, regional, state, or federal sources.

MCL 380.11a(3).

The Legislature has afforded the school districts only (1) the powers as expressly provided in the act, (2) power implied or incident to those express powers, and (3) except as provided by other law, power incidental or appropriate to the performance of a function related to operation of a public school and the provision of public education services in the interests of public elementary and secondary education in the school district.

School districts are afforded far less authority than are municipalities and would be inconsistent to afford school districts greater authority when it comes to regulating firearms.

Municipalities have general authority to regulate as necessary for the public interest, but are preempted from regulating firearms by MCL 123.1102 and field preemption by the Legislature. [1] It would follow that the Legislature likewise intended school districts, an organization of lesser power than municipalities, to also be preempted.

C. Permitting school district's to circumvent MCL 123.1101 et seq. through MCL 750.552 improperly renders MCL 123.1102 superfluous.

Various briefs by defendant/appellees and amici in this case have relied on MCL 750.552 for the school district's support for its firearm ban policy. MCL 750.552 provides,

> a person shall not do any of the following:
>
> (a) Enter the lands or premises of another without lawful authority after having been forbidden to do so by the owner or occupant or the agent of the owner or occupant.
>
> (b) Remain without lawful authority on the land or premises of another after being notified to depart by the owner or occupant or the agent of the owner or occupant.
>
> (c) Enter or remain without lawful authority on fenced or posted farm property of another person without the consent of the owner or his or her lessee or agent. A request to leave the premises is not a necessary element for a violation of this subdivision. This subdivision does not apply to a person who is in the process of attempting, by the most direct route, to contact the owner or his or her lessee or agent to request consent.

MCL 750.552(1). The school district attempts to circumvent MCL 123.1102 by applying this statute. Amici curiae Michigan Education Association and Michigan Parent Teacher Association go so far as to argue that MCL 123.1102 supports finding that MCL 750.552 renders any need for a *Llewellyn* analysis unnecessary. Brief of Amicus Curiae Michigan Education Association

[1] See *Capital Area Dist Library v Michigan Open Carry, Inc*, 298 Mich App 220, 241; 826 NW2d 736 (2012) ("Although a district library is not a local unit of government as defined by MCL 123.1101(a), legislative history, the pervasiveness of the Legislature's regulation of firearms, and the need for exclusive, uniform state regulation of firearm possession as compared to a patchwork of inconsistent local regulations indicate that the Legislature has completely occupied the field that CADL seeks to enter.").

and Michigan Parent Association, page 10. This argument is faulty considering the net effect on MCL 123.1102.

MCL 123.1102 reads,

> A local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols, other firearms, or pneumatic guns, ammunition for pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state.

Because the provision includes the phrase, "except as otherwise provided by federal law or a law of this state," MCL 123.1102, it was argued that MCL 123.1102 "does not impact" MCL 750.552, Brief of Amicus Curiae Michigan Education Association and Michigan Parent Association, page 8. However, that result would effectively render MCL 123.1102 superfluous.

It is a longstanding "rule that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Clark v Rameker*, 134 S Ct 2242, 2248; 189 L Ed 2d 157 (2014) (internal quotations omitted). Reading the phrase "except as otherwise provided by federal law or a law of this state," MCL 123.1102, as permitting the total bypass of the remainder of the provision through MCL 750.552 would render that statute entirely superfluous. Any government unit, whether a city, township, school, or university, could totally avoid the preemption of MCL 123.1102 by citing trespass for the very behavior MCL 123.1102 limits them from regulating.

D. *Llewellyn* applies to "policies" as well as ordinances.

Although the language of this Court in *Llewellyn* states that the test applies to ordinances, it has previously been applied to other forms of regulation, such as policies. *See Capital Area Dist Library v Michigan Open Carry, Inc*, 298 Mich App 220; 826 NW2d (2012) (hereinafter

"*CADL*"). The Court of Appeals in *CADL* did not limit application only to ordinances, but applies *Llewellyn* to regulation by a lower-level governmental entity generally and in particular applied the test to the weapon "policy" of the district library. *Id.* at 226, 233. The *Llewellyn* test applies equally to the policy in this case as it applies to a district library.

II. THE COURT OF APPEALS FAILED TO PROPERLY ANALYZE THE *LLEWELLYN* FACTORS.

The Court of Appeals first analyzed the *Llewellyn* factors relative to MCL 123.1102 in *CADL*, 298 Mich App at 234. The Court of Appeals for the present case and the companion case, *Michigan Open Carry, Inc v Clio Area School District*, Docket No. 155204, improperly analyzed the factors by contradicting the analysis in *CADL*. Amicus Curiae Michigan Coalition for Responsible Gun Owners agrees with the Court of Appeals' analysis of the *Llewellyn* factors in *CADL* and adopts it as such.

Further, Amicus curiae Michigan Coalition for Responsible Gun Owners fully endorses and supports the analysis of the *Llewellyn* factors as argued by the plaintiff-appellants of the companion case, *Michigan Open Carry, Inc v Clio Area School District*, Docket No. 155204.

A. The pervasiveness of Michigan's regulatory scheme supports finding preemption.

As noted by the Court of Appeals in this matter, and as stated in brief by parties, Michigan has pervasively regulated firearms in Michigan. It is recognized that "while the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer preemption, it is a factor which should be considered as evidence of preemption." *People v Llewellyn*, 401 Mich 314, 324; 257 NW2d 902 (1977). "The breadth and detail of [a] statutory scheme provides an indication that the Legislature has preempted . . . ." *Id.* at 327.

Confusingly, the Court of Appeals' and the defendant/appellees' characterize the impact of the pervasiveness factor as one of interpreting the Legislature intent for pervasively regulating. Instead of looking to the "breadth and detail" of Michigan's regulatory scheme to find occupation of the regulatory field, the Court of Appeals and defendant/appellees twisted the factor into interpreting the legislature's intent in pervasively regulating as an intent to keep firearms out of schools. See *Michigan Gun Owners, Inc v Ann Arbor Pub Sch*, 318 Mich App 338, 353–54; 897 NW2d 768 (2016); Defendant/Appellee's Brief, pp. 23-24. This practice goes beyond the scope of the factor as used in *Llewellyn*, ignoring the purpose of the factor and conflating it with the second factor, legislative history.

Pervasiveness goes to breadth and detail. The *CADL* court characterized Michigan's regulatory scheme as a "multifaceted attack." *CADL*, 298 Mich App at 239 (citing *Llewellyn*, 401 Mich at 326). "The extent and specificity of this statutory scheme, coupled with the Legislature's 'clear policy choice [in MCL 123.1102] to remove from local units of government the authority to dictate where firearms may be taken, demonstrates that the legislature has occupied the field of firearm regulation that the library's weapon policy attempts to regulate: the possession of firearms.'" *Id.* (*citing Mich Coalition for Responsible Gun Owners v Ferndale*, 256 Mich App 401, 414, 662 NW2d 864 (2003)).

B. The fourth *Llewellyn* factor looks at the nature of the regulated subject matter.

The fourth *Llewellyn* factor is stated as "the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest." *Llewellyn*, 401 Mich at 324. At the heart of this factor is the "nature" of the regulated subject.

Rather than discussing the "nature" of the regulated subject, the Court of Appeals and the defendant/appellees have instead focused on the contextual effect of regulating the subject matter. This, too, runs contrary to the purpose of the factor and how it was applied by the Court. See *Id.* at 327-28. Firearm possession, and the right of self-defense that is inseparable from it, demand uniform treatment.

Michigan has a long tradition of recognizing the role of firearms as tools of defense. The fundamental interest in firearm possession is currently enunciated in Article 1, § 6 of the Michigan Constitution of 1963, which states: "Every person has a right to keep and bear arms for the defense of himself and the state." As mentioned, this right has carried over unchanged across each version of the Michigan Constitution since 1908.

Regarding the importance of self-defense, MCL 780.974, the Self-Defense Act (often referred to as "Stand Your Ground,") states: "This act does not diminish an individual's right to use deadly force or force other than deadly force in self-defense or defense of another individual as provided by the common law of this state in existence on October 1, 2006."

When a school chooses the state of being unarmed as a condition placed on entry to real property under its control, it is effectively depriving many individuals of the right to defend themselves and others. The court is certainly able to take judicial notice of how absolutely ineffective these policies are based on recent reports from Parkland, Florida. Brief of Amicus Curiae Michigan Education Association and Michigan Parent Association, page 21.

It is also important to recognize that 608,390 people, approximately 8% of Michigan's adult population, are CPL holders.[2] Of these, during 2016 (the most recent year for which full data are available), only 1,837 CPL holders were convicted of a crime, including non-violent

[2] MLIVE, "Michigan gun ownership by the latest numbers," April 9, 2017, http://www.mlive.com/news/index.ssf/2017/04/michigan_gun_ownership_by_the.html.

crimes; the crime rate of CPL holders is only 0.3% (three tenths of one percent.) In 2016, there were 764,788 total criminal offenses reported in Michigan, [3] while the US Census Bureau states that there are approximately 10 million residents of Michigan (including children),[4] for a total crime rate of approximately 7.6%. CPL holders, the specific group targeted by the school districts' policies, have an overall crime rate of 4% of the general population. To put it another way, residents of Michigan have a crime rate that is more than 25 times greater than CPL holders do.

CPL holders have invested their time, training, and money into complying with Michigan law to obtain their licenses. They should not be denied due process by having to guess regarding what behavior is allowable in various locations. Moreover, they should not be stripped of their right to defend themselves and others, after nearly two decades of proving themselves to be among the most law-abiding groups within the state.

III. THE COURT OF APPEALS ERRED IN ITS DECISION THAT THE SCHOOL DISTRICT WEAPONS POLICIES ARE NOT PREEMPTED.

The school district is preempted under both steps of *Llewellyn*. Not only does the school district's policy directly conflict with MCL 750.237a(5)(c), but the *CADL* court's analysis of the *Llewellyn* factors demonstrate an intent to occupy the field of firearm regulation. *Llewellyn* most certainly applies to the school district's policy as it would any regulation.

As far as the *Llewellyn* factors, the panel below and the defendant/appellees have mischaracterized the factors to conform to their desired outcome. As the *CADL* court found, the

[3] Michigan Incident Crime Reporting, "2016 Michigan's Crime at a Glance," http://www.michigan.gov/documents/msp/a2_crime_at_a_glance_598812_7.pdf.
[4] United States Census Bureau, "QuickFacts: Michigan," https://www.census.gov/quickfacts/fact/table/mi/pst045217.

legislative history, the pervasiveness of the state's regulatory scheme, and the nature of the subject matter support finding that the Legislature has occupied the field of firearm possession.

Furthermore, the Court of Appeals was obligated to follow the holding of precedential opinion pursuant to MCR 2.215(J)(1). "A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals . . . ." MCR 7.215(J)(1). Since neither of these conditions obtain in the instant matter, the Court of Appeals disregarded not only the bedrock common law rule of *stare decisis*, it also ignored a specific court rule. The Court of Appeals also failed to convene a special panel and poll the judges, as required by MCR 7.215(J)(3), constituting clear error.

Respectfully submitted by:

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